Petition

81-2089

No. 81-

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

PHILLIPS PETROLEUM COMPANY

Petitioner,

v.

ASHLAND OIL, INC., *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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May 1982

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QUESTIONS PRESENTED

1. Whether Section 11 of the Helium Act, which in terms merely exempts helium from rate regulation under the Natural Gas Act, has an additional consequence: that of depriving of its defense of payment a purchaser of natural gas streams containing helium under contracts conveying the entire stream, including the helium, when the producer of the natural gas claims an entitlement to special compensation for the helium in addition to the price paid under the purchase contracts.

2. Whether any special compensation to such a natural gas producer should be determined according to state law, as this Court ruled in *Phillips Petroleum Co. v. Texaco Inc.*, 415 U.S. 125 (1974), or according to federal common law as the court below has ruled.

LIST OF PARTIES

The names of all parties except the United States are included in the caption to this petition. The corporate affiliations and interests of petitioner Phillips Petroleum Company are set forth in Phillips' memorandum in support of petitions for certiorari in *Panhandle Eastern Pipe Line Co., et al. v. Mobil Oil Company, et al.*, No. 81-1920, *Northern Natural Gas Company, et al. v. Mobil Oil Corporation, et al.*, No. 81-1921, and *Cities Service Gas Company, et al. v. Mobil Oil Corporation, et al.*, No. 81-1922.

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Petitioner,

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Phillips Petroleum Company petitions for a writ of certiorari to review a decision of the Court of Appeals for the Tenth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals is not reported. It is reproduced as Appendix A to this petition at pages 1a – 5a below. Prior opinions of the court of appeals and the District Court for the Northern District of Oklahoma are reported at 364 F. Supp. 6, 554 F.2d 381, 463 F. Supp. 619, and 607 F.2d 335 and are reproduced in the joint appendix to the petitions in Nos. 81-1919, 81-1920, 81-1921, and 81-1922, at pages A468-89, A429-46, A390-428, and A385-89, respectively.

JURISDICTION

The judgment of the court of appeals (p. 6a, *infra*) was entered on February 10, 1982. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 11 of the Helium Act of 1925, as added by the Helium Act Amendments of 1960, 74 Stat. 922, 50 U.S.C. § 167i, provides:

> The provisions of the Natural Gas Act of June 21, 1938, as amended, shall not be applicable to the sale, extraction, processing, transportation, or storage of helium either prior to or subsequent to the separation of such helium from the natural gas with which it is commingled, whether or not the provisions of such Act apply to such natural gas, and in determining the rates of a natural gas company under sections 4 and 5 of the Natural Gas Act, as amended, whenever helium is extracted from helium-bearing natural gas, there shall be excluded (1) all income received from the sale of helium; (2) all direct costs of exploration, production, gathering, extraction, processing, compression, transportation or storage divided and allocated to helium on a volumetric basis.

STATEMENT

The final opinion in this case concerns merely the appropriate measurement of prejudgment interest. The judgment entered thereon, however, embodies the decision of the court of appeals that Ashland Oil, Inc., is entitled to recover from Phillips Petroleum Company $3 an MCF for helium contained in natural gas sold by Ashland to Phillips, plus prejudgment interest. The court awarded this recovery to Ashland even though it had decided in related litigation (the *Grounds* or *Consolidated Helium* litigation here in Nos. 81-1919, 81-1920, 81-1921, and 81-1922) that the two contracts by which Ashland conveyed natural gas streams to Phillips covered the helium component of the streams. The court held that, despite the terms of the contracts, Ashland had not been paid for the helium. Its reasoning, developed in the same related litigation, rested on Section 11 of the Helium Act, added by the Helium Act Amendments of 1960. Section 11 makes the Natural Gas Act inapplicable to helium. The Federal Power Commission treated interstate natural gas sales contracts as rate schedules under the Natural Gas Act. Therefore, the court concluded, payments made under the contracts, or rate schedules, could not have been for the helium content. In the case of the Ashland-Phillips contracts, this conceptual reasoning was even more tenuous than in some other cases because the FPC had never adjusted the contract prices or otherwise prevented Ashland from collecting the full amount it bargained for when it sold the natural gas streams.

To measure the quantum meruit recovery to which it held Ashland entitled, the court directed the use of a so-called work-back method, starting with a value of helium at some point in the production chain and deducting costs of processing in working back to the well-head value that was being computed. It chose this manner of valuation in

preference to the more usual method of considering comparable well-head sales purportedly because of the lack of enough such comparable sales. But it made no inquiry into whether the law of Texas, which governed the Ashland-Phillips transactions and whose law of quantum meruit was therefore the appropriate law under this Court's decision in *Phillips Petroleum Co. v. Texaco Inc.*, 415 U.S. 125 (1974), allowed the use of the work-back method or, if it did, how the method should be applied.

Certiorari has been sought by Phillips in respect of two previous judgments of the court of appeals in this case and denied. 434 U.S. 921, 446 U.S. 936. Petitions of the United States in respect of the first judgment and of Ashland in respect of the second have also been denied. 434 U.S. 568, 446 U.S. 936. This petition is filed because of the filing of the petitions in Nos. 81-1919, 81-1920, 81-1921, and 81-1922 asking for review of a decision in the related *Consolidated Helium* litigation (to which Phillips is also a party). The decision concerning the measurement of prejudgment interest is integral to the final decision on the amount of Ashland's award and is not on a separate, collateral issue. Phillips has maintained its basic position on the legal questions here presented throughout the proceedings, which were consolidated for hearing in the court of appeals on two occasions, including the hearing that preceded the most recent decisions in both cases.

REASONS FOR GRANTING THE WRIT

The questions presented here will be seen to be the same as those that Phillips in a memorandum in Nos. 81-1920, 81-1921, and 81-1922 joins with the petitioners in those cases in urging this Court to hear. The reasons for granting the writ to hear the questions in this case are stated in Phillips' memorandum in the *Consolidated Helium* cases.

The memorandum has been served upon Ashland and the United States, the only other party to this case, as parties to the *Consolidated Helium* cases. The reasons are, in brief, that the effect ascribed to Section 11 of the Helium Act by the court of appeals poses an important question of federal law that has not been but should be decided by this Court, and that the invocation by the court below of federal common law in determining the measure of Ashland's quantum meruit recovery is inconsistent with this Court's decision in *Phillips Petroleum Co. v. Texaco Inc.*, 415 U.S. 125 (1974).

CONCLUSION

The writ should be granted. If the Court grants the writs in Nos. 81-1920, 81-1921, and 81-1922, it may wish, however, to consider holding this case to await the outcome of those cases.

Respectfully submitted,

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May 1982

Appendix

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

ASHLAND OIL, INC., *Plaintiff-Appellant*	)	
v.	)	No. 81-1159
PHILLIPS PETROLEUM COMPANY, *Defendant-Appellee,*	)	
and	)	
UNITED STATES OF AMERICA *Intervenor-Appellee.*	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA (D.C. No. 67-C-238)

Filed United States Court of Appeals Tenth Circuit
February 10, 1982 Howard K. Phillips Clerk.
Not to be routinely published.

* * * * * * * * * * *

Before SETH, Chief Judge, MCWILLIAMS and BARRETT, Circuit Judges.

BARRETT, Circuit Judge.

Ashland Oil, Inc. (Ashland) appeals from an order of clarification providing that prejudgment interest shall be calculated on an annual basis rather than a month-to-

month basis as proposed by Ashland. The litigative history of this matter and its related, consolidated cases is expansive. Our discussion will be directed solely to those areas we deem necessary to the determination of Ashland's allegation of error.

Ashland initiated this action in 1967 by filing a complaint against Phillips Petroleum Company (Phillips) seeking the reasonable value of helium commingled with the natural gas delivered to Phillips by Ashland. The United States intervened and was aligned as a party defendant in light of an idemnification clause in its contracts with Phillips pursuant to which the United States was potentially obligated to indemnify Phillips for helium payments it made in excess of a predetermined amount.

Trial was to the court. A judgment was entered in Ashland's favor in August 1973.[1] Within its judgment the District Court found that Ashland was entitled to recover from Phillips the reasonable value of the helium contained in the natural gas at the wellhead. The District Court, also, at the specific suggestion of Ashland, awarded Ashland prejudgment interest and ordered that it be calculated and assessed at six (6) percent per annum.

On appeal we affirmed, *en banc,* the District Court's determination of Phillips' liability, the valuation method employed, and the award of prejudgment interest. *Ashland Oil, Inc. v. Phillips Petroleum Company,* 554 F.2d 381 (10th Cir. 1977), *cert. denied,* 434 U.S. 921 (1977). However, we set aside the computation of values for the contained helium the District Court had arrived at. Accordingly, we remanded for proceedings on the proper starting point, together with the amount chargeable to investment, and the expense allocable to the production of

[1] 364 F. Supp. 6 (N.D. Okl. 1973).

hydrocarbons in order to arrive at the value of the contained helium for which payment must be made to the producers and landowners.

On remand,[2] the District Court: established $3.00 per thousand cubic feet as the value of the helium commingled with the natural gas; denied Ashland prejudgment interest on the ground the amount owed to it had been unliquidated and in good faith dispute, and; awarded Ashland postjudgment interest from the date of judgment on remand.

On appeal,[3] we affirmed the $3.00 value and the award of postjudgment interest. However, we reversed the denial of prejudgment interest and remanded for entry of judgment to include prejudgment interest.

Upon remand the District Court entered the following order on January 9, 1980:

> In accordance with the mandate of the Tenth Circuit Court of Appeals in this case, the judgment herein is hereby modified to include prejudgment interest as provided by law.
>
> [R., Vol. I, at p. 23].

On January 6, 1981, Ashland moved to clarify the prejudgment interest award, requesting "that the judgment for prejudgment interest should run from the end of each month's delivery of helium contained in the natural gas received by Phillips Petroleum Company from the plaintiff during the years in controversy in this suit." [R., Vol. I, at p. 24.] Within its response, Phillips contended that the prejudgment interest should be calculated at the rate of

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[2]463 F. Supp. 619 (N.D. Okl. 1978).

[3]*Ashland Oil, Inc. v. Phillips Petroleum Co.*, 607 F.2d 335 (10th Cir. 1979), *cert. denied*, 446 U.S. 936 (1980).

"six percent per annum". In so doing, Phillips set forth Ashland's own proposed findings tendered following the 1973 and 1978 trials wherein Ashland sought prejudgment interest from Phillips "at the rate of 6% per annum", and "that prejudgment interest shall be calculated from the end of each year in question".

On January 15, 1981, the District Court entered its order of clarification, ordering that "prejudgment interest be calculated at the rate of six percent (6%) per annum from the last day of each year in question". [R., Vol. I, at p. 70].

On appeal, Ashland contends the District Court erred in awarding prejudgment interest on an annual rather than a monthly basis. We must disagree.

Within our first Ashland opinion we observed:

> The trial court acted within its discretion under federal law in the allowance of prejudgment interest. *Royal Indemnity Co. v. United States,* 313 U.S. 289, 61 S.Ct. 995, 85 L.Ed. 1361 . . . .
>
> 554 F.2d at p. 392.

Thus, when, as here, the allowance of prejudgment interest is within the discretion of the trial court, the manner of payment is, absent a controlling statute or common law, to be determined by the court. In *Royal Indemnity Co. v. United States,* 313 U.S. 289 (1941), the Court observed:

> A suit upon a contractual obligation to pay money at a fixed or ascertainable time is a suit to recover damage for its breach, including both the principal amount and interest by way of damage for delay in payment of the principal, after the due date. And in the absence of any controlling

> statutory regulation the trial court is as competent to determine the amount of interest for delay as any other item of damage.
>
> * * *
>
> In the absence of an applicable federal statute, it is for the federal courts to determine, according to their own criteria, the appropriate measure of damage, expressed in terms of interest, for non-payment of the amount found to be due. *Board of County Commissioners v. United States,* 308 U.S. 343, 350, 352; *Young v. Godbe, supra,* 565; cf. *Billings v. United States,* 2323 U.S. 261, 284, *et seq.*
>
> 313 U.S. at pp. 295-296.

We must hold that the District Court's award of interest at the rate of six percent per annum was an appropriate measure of damage, "expressed in terms of interest". We are disinclined to set aside such discretionary determinations, particularly in light of the fact that Ashland had requested similar relief during the course of two prior proceedings herein. We are not unmindful of Ashland's explanation therefor. Even so, we find no abuse of discretion in the District Court's determination.

WE AFFIRM.

IN THE
UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Before Honorable Oliver SETH *Honorable Robert H.* MCWILLIAMS *and Honorable James E.* BARRETT, *Circuit Judges*

ASHLAND OIL, INC., *Plaintiff-Appellant*	)	
	)	No. 81-1159
v.	)	(D.C. No. 67-C-238)
PHILLIPS PETROLEUM COMPANY, *Defendant-Appellee,*	)	
and	)	
UNITED STATES OF AMERICA *Intervenor-Appellee.*	)	

JUDGMENT

Filed March 9, 1982, Jack S. Silver, Clerk

This cause came on to be heard on the record on appeal from the United States District Court for the Northern District of Oklahoma, and was argued by counsel.

Upon consideration whereof, it is ordered that the Judgment of that court is AFFIRMED.

/s/ Howard K. Phillips, Clerk

Opposition

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vs.

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
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FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

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No. 81-2089

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October Term, 1981

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VS.

ASHLAND OIL, INC., et al.,
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ON PETITION FOR WRIT OF CERTIORARI TO THE
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FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

STATEMENT

Respondent Ashland Oil, Inc. has in past years, in this same case, filed three briefs opposing petitions for a writ of certiorari seeking revi - of the same questions now posed again by petitioner Phillips Petroleum Company. (Nos. 77-221, 77-530, 79-1250). Prior to that, in the related helium litigation from Kansas, now the subject of petitions in Nos. 81-1919 to 81-1922, inclusive, Ashland joined in briefs in opposition to other petitions seeking to review the liability questions. (Nos. 71-218, 71-238, 71-243, seeking

review of *Northern Natural Gas Company v. Grounds*, 441 F.2d 704 [10th Cir. 1971], cert. denied, 404 U.S. 951, 1063 [1972]). Petitioner Phillips Petroleum Company was also a party in the latter case, aligned with the petitioners seeking review.

Ashland Oil, therefore, will not reiterate its prior briefs; but merely adopts the Brief in Opposition of Amoco Production Company, et al., in Nos. 81-1919, 81-1920, 81-1921 and 81-1922, in which Ashland joined. Ashland's related companies as required by Rule 28.1 are listed in that brief.

All liability issues were finally determined in the liability phase of the *Grounds* case in 1971. The valuation issue herein was finally determined by the en banc decision in *Ashland Oil, Inc. v. Phillips Petroleum Company*, 554 F.2d 381 (10th Cir. 1977), cert. denied, 434 U.S. 921, 968 (1977).

The 1979 panel decision in this case involved only Ashland's appeal on valuation and interest questions, 607 F.2d 335. Yet Phillips again sought review of the questions decided in 1977. That petition was denied at 446 U.S. 936 (1980).

The present unpublished decision involves only the method of calculating prejudgment interest. (A. 1a). Yet petitioner seeks review of the liability issues in a case to which both Ashland and Phillips were parties, decided in 1971; and reaffirmed in this case by an en banc court of appeals' decision in 1977.

And the questions posed continue to be distortions of the actual decisions, as we have repeatedly observed. They do not conflict with other court cases. They do not involve questions which are likely to recur. They are localized issues, decided so as to require payment of a

reasonable value for a commodity which petitioners received from the owners.

The profit from delay to petitioners in the helium litigation is at least a million dollars a month.

Yet if Phillips is permitted with impunity to keep filing petitions to review questions decided long ago, review of which has been repeatedly denied, there is nothing to prevent the petitioners in Nos. 81-1920, 81-1921 and 81-1922, from continuing to take further appeals from future district court proceedings on collateral questions, and continue, ad infinitum, to petition for review of questions in this Court which were finally decided in 1971.

The concept of finality in our system of jurisprudence must have more meaning than that. If not, the floodgates, already open, will themselves be swept away.

The petition should be denied.

Respectfully submitted,

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Opposition

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ASHLAND OIL, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

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PHILLIPS PETROLEUM COMPANY, PETITIONER

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ASHLAND OIL, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is not reported. The order of the district court on prejudgment interest is not reported, but is reproduced in the joint appendix to the petitions for a writ of certiorari in Nos. 81-1919, 81-1920, 81-1921 and 81-1922 (J.A. A492).[1] The order of clarification of the district court on prejudgment interest (J.A. A490-A491) is unreported. The prior opinions of the court of appeals (J.A. A385-A389, A429-A467) are

[1]These petitions, all denied on June 14, 1982, were filed in the following related helium cases, referred to as the *Consolidated Helium Cases: Grounds* v. *Mobil Oil Corp.*, No. 81-1919; *Panhandle Eastern Pipe Line Co.* v. *Mobil Oil Corp.*, No. 81-1920; *Northern Natural Gas Co.* v. *Mobil Oil Corp.*, No. 81-1921; and *Cities Service Gas Co.* v. *Mobil Oil Corp.*, No. 81-1922.

reported at 607 F. 2d 335 and 554 F. 2d 381. The prior opinions of the district court (J.A. A468-A489, A390-A428) are reported at 364 F. Supp. 6 and 463 F. Supp. 619.

JURISDICTION

The judgment of the court of appeals was entered on February 10, 1982. The petition for a writ of certiorari was filed on May 11, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This litigation is a companion to Nos. 81-1919, 81-1920, 81-1921 and 81-1922 (see footnote 1, *supra*), and raises two of the issues presented by those cases: whether producer-sellers of helium bearing natural gas are entitled to recover from their purchasers the reasonable value of the commingled helium in addition to the contract price for the natural gas, and whether the court of appeals erred in applying federal rather than state law to certain issues in the litigation. See Memorandum for the United States, Nos. 81-1919, 81-1920, 81-1921 and 81-1922 at I. The background of this litigation is adequately set forth in that memorandum, and will not be repeated here.[2] See *id.* at 4-6.

2. Petitioner now seeks review of decisions by the district court (J.A. A490-A492) and court of appeals (Pet. App. 4a-5a) that provide for six percent prejudgment interest calculated annually on a judgment previously affirmed by the court of appeals and denied review by this Court. See 607 F. 2d 335 (1979), cert. denied, 446 U.S. 936 (1980).

DISCUSSION

1. Petitioner again raises the issue of the liability of the Helex Companies for the reasonable value of the helium content of the natural gas purchased by the Helex Companies from their lessee-producers. The United States adheres

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[2]A copy of the government's memorandum in Nos. 81-1919, 81-1920, 81-1921 and 81-1922 has been served on petitioner.

to the view that the court of appeals, both in this case and in the *Consolidated Helium Cases,* erred in concluding that the lessee-producers are entitled to additional compensation for the helium component of the natural gas stream. See Memorandum for the United States, Nos. 81-1919, 81-1920, 81-1921 and 81-1922 at 9. This Court, however, has denied petitions for a writ of certiorari presenting this issue on four previous occasions, most recently on June 14, 1982, in the *Consolidated Helium Cases.* See also *Northern Natural Gas Co.* v. *Grounds,* 441 F. 2d 704 (10th Cir.), cert. denied, 404 U.S. 951 (1971); *Ashland Oil, Inc.* v. *Phillips Petroleum Co.*, 554 F. 2d 381 (10th Cir. 1975), cert. denied, 434 U.S. 921, 968 (1977); *Ashland Oil, Inc.* v. *Phillips Petroleum Co.*, 607 F. 2d 335 (10th Cir. 1979), cert. denied, 446 U.S. 936 (1980). We therefore decline to present this issue again to this Court.

2. Petitioner also contends that the court of appeals erred in applying federal common law to determine the measure of Ashland's quantum meruit recovery, rather than state law as indicated by *Phillips Petroleum Co.* v. *Texaco, Inc.*, 415 U.S. 125 (1974). This Court did hold in *Phillips Petroleum Co.* v. *Texaco, Inc., supra,* that suits to recover the reasonable value of helium are, "in effect, * * * action[s] in *quantum meruit,* whose source is state law and not federal law." 415 U.S. at 129. Nonetheless, several factors appear to justify the court of appeals' application of a uniform federal rule in this case. The helium litigation, both in this case and in the *Consolidated Helium Cases,* includes claimants from three states (Kansas, Texas, and Oklahoma). Moreover, the United States has substantial potential liability under the indemnity clause of its contracts with the Helex Companies, including petitioner. Where application of state law could "lead to great diversity in results by making identical transactions subject to the vagaries of the laws of the several states," this Court has

stated that the "desirability of a uniform rule is plain." *Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 367 (1943). Thus, the application of federal common law in this case is not an issue requiring this Court's review. See Memorandum for the United States, Nos. 81-1919, 81-1920, 81-1921 and 81-1922 at 10-11.

3. Finally, although the decision of the court of appeals that petitioner asks this Court to review deals only with the method of calculating prejudgment interest, petitioner does not challenge the method of interest calculation approved by the court of appeals. Instead, petitioner seeks review of issues of liability and federal law that were decided in previous appeals and denied review by this Court. While the United States agrees with petitioner that the issue of liability has been wrongly decided, we cannot support this attempt to use the court of appeals' decision on the narrow issue of calculation of prejudgment interest to review again the determination of liability made long ago.

CONCLUSION

The petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

AUGUST 1982